

Colorado Environmental Coalition  
The Wilderness Society  
Sierra Club  
Western Colorado Congress  
Colorado Mountain Club  
National Parks Conservation Association  
Natural Resources Defense Council

January 9, 2003

The Hon. Les Hampton  
The Hon. T. Wright Dickenson  
The Hon. Marianna Raftopoulos  
Moffat County Board of County Commissioners  
221 W. Victory Way  
Craig, CO 81625

Submitted via facsimile: 970-824-9191

**RE: Request to Table R.S. 2477 Resolution Pending Additional Opportunity for Public Review**

Dear Commissioners Hampton, Dickinson and Raftopoulos:

Please accept these comments on behalf of the Colorado Wilderness Network regarding Moffat County's R.S. 2477 rights-of-way claims. These comments are also submitted on behalf of the Colorado Environmental Coalition, The Wilderness Society, Sierra Club, Western Colorado Congress, the Colorado Mountain Club, the National Parks Conservation Association, and Natural Resources Defense Council. We appreciate the opportunity to provide these comments to you.

We have grave concerns about these claims, some of which are outlined below. Given our concerns, we strongly urge that the Board of County Commissioners table this decision when it meets on this issue on January 10 until additional information can be gathered, and until the ramifications of these claims can be thoroughly explored and discussed. The map of the proposed rights-of-way, first provided to the public in late December 2002 and dated January 2, 2003, contains scores of routes across hundreds of thousands of acres of public lands. Providing useful input on individual routes given the time frame for comment is therefore extremely difficult. We would like to schedule a time at your earliest convenience to meet with you and discuss these issues in person.

There are many potential ramifications associated with this process, both financial and environmental. A few of these follow:

**Financial Ramifications**

- Costs of administering and maintaining the route system;
- Potential liability from litigation for failing to maintain routes to appropriate standards;
- Costly litigation would result (as in Utah) should Moffat County attempt to maintain routes prior to a determination of a valid right-of-way – a course of action we would vigorously oppose;
- Loss of quality hunting opportunities from degradation of habitat and wildlife security areas;
- Impacts to private property from increased motorized use on adjacent public lands;
- Increased vandalism to private property due to increased public access;
- Impacts to private land from increased wildlife displacement off of public lands;
- Impacts to the tourism economy caused by a degradation of natural values; and,
- Impacts to livestock grazing caused by the expansion of noxious weeds caused by route use and maintenance.

### Environmental Ramifications

We are gravely concerned about the potential environmental problems associated with the wide-scale claims made in this process. These alleged rights-of-way cross every Wilderness Study Area and citizen-proposed wilderness in the county, as well as designated Areas of Critical Environmental Concern, special recreation management areas, the Browns Park Wildlife Refuge, and Dinosaur National Monument. The breadth of the claims, as depicted on the map, is astonishing.

For example, a spaghetti web of County-identified routes appears within Dinosaur National Monument. Virtually every one of these claimed routes is located within the 200,000 acres that the Department of the Interior recommended for wilderness protection in 1978, meaning that the lands were found to be “roadless,” and thus to contain no constructed routes, and to have wilderness character. Similarly, County-identified routes criss-cross the Cold Spring Mountain, Cross Mountain, Dinosaur Adjacent, and Diamond Breaks Wilderness Study Areas (WSAs). Inventories conducted by BLM in 1980 found no constructed routes within the more than 80,000 acres that make up these areas, and only a few un-constructed “ways” (which BLM defined as “a two-wheel track created only by the passage of vehicles”). Each of these areas was found by BLM to be roadless and to have wilderness character. The designation of each of these areas as WSAs was supported by Colorado’s Department of Natural Resources. Since 1980, each area has been managed as wilderness, with no construction of new roads. A number of the routes identified by Moffat County within the WSAs appear to be little more than stream-beds, possibly misidentified as routes based on aerial photos.

These areas, and other wild lands traversed by routes identified by Moffat County, provide the last roadless and undeveloped lands in the county, provide outstanding opportunities for backcountry recreation and solitude, safeguard critical wildlife habitat, guard against the spread of invasive species, include numerous sensitive species and rare plant communities, and contain countless priceless archeological sites.

All these environmental values would be seriously jeopardized by these claims. For example, Dinosaur National Monument, which receives hundreds of thousands of visitors a year, contains habitat for imperiled peregrine falcons, a number of threatened ecosystems, the Yampa River Wild and Scenic River corridor, and ancient rock art, all of which could be degraded by road construction, maintenance, and use. We believe that asserting these rights will result in long-term damage to natural resources and to the emerging economy, which depends upon protection of these valuable national public lands. We also believe that the financial burden imposed by asserting and defending these claims would be onerous to the county, and that Moffat County’s limited budget could better serve its residents elsewhere.

### Failure to Properly Address Compliance with R.S. 2477

While Moffat County is apparently attempting to pursue R.S. 2477 claims for a variety of routes, there is little indication that the County is applying the key tests to determine whether the claims have any validity. As you know, Revised Statute 2477 (R.S. 2477) is an ancient Civil War era law that states, “The right-of-way for the construction of highways over public land, not reserved for public uses, is hereby granted.” This law was repealed in 1976 as part of the Federal Land Management Policy Act (FLPMA). However short, the statute does provide standards that must be met for it to apply, and there is little indication from the documents provided that Moffat County addressed these standards.

## 1. Construction

First, for a right-of-way (ROW) to be valid, a highway must have been *constructed*. BLM has interpreted the term "construction" in R.S. 2477 to require some form of purposeful, physical building or improving.

Some form of mechanical construction must have occurred to construct or improve the highway. A highway right-of-way cannot be established by haphazard, unintentional, or incomplete actions. For example, the mere passage of vehicles across the land, in the absence of any other evidence, is not sufficient to meet the construction criteria of R.S. 2477 and to establish that a highway right-of-way was granted.

See Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F.Supp. 2<sup>nd</sup> 1130, 1138 (D. Utah 2001), on appeal to the 10<sup>th</sup> Circuit (supporting BLM's rejection of multiple counties' assertions that continued use amounted to construction). The inventory protocol developed by Moffat County contains absolutely no recognition of the need for purposeful construction. For example, the inventory protocol includes categories of identified routes such as "dirt," "two-track," "ATV," "livestock," and "no physical evidence." Moffat County, "R.S. 2477 Inventory Protocol" (June 2002) at 3. None of the descriptions of these categories include any mandate that intentional, physical construction occurred. "Dirt" routes are identified as those where "Vegetation has been mechanically removed to bare soil." However, the protocol contains no mandate that the "mechanical removal" have occurred incident to purposeful construction; it could have occurred by the passage of vehicles. Two-tracks and ATV routes often result from the passage of vehicles, not purposeful construction of a highway; livestock routes as used here appear to be routes created by livestock or horses – hardly routes that meet the definition of "construction."

Thus, for the vast majority of routes identified by the Moffat County protocol, there is no attempt to address evidence concerning construction, a key prerequisite to making any potentially valid R.S. 2477 claim.

## 2. Highway

Second, for R.S. 2477 to apply, the route constructed must be a *highway*. BLM has previously concluded that:

The claimed highway right-of-way must be public in nature and must have served as a highway when the underlying public lands were available for R.S. 2477 purposes. It is unlikely that a route used by a single entity or used only a few times would qualify as a highway, since the route [must have] open public nature and uses. Similarly, a highway connects the public with identifiable destinations or places.

SUWA v. BLM, 147 F.Supp. 2<sup>nd</sup> at 1143. The Moffat County protocol states that the use of a claimed R.S. 2477 right-of-way claims can be identified in several ways, including:

connects road "a" with road "b"  
motorcycle route for recreational use  
access to cabin  
maintenance of barbed wire fence

- access to hang gliding launch pad
- access to water reservoir
- access to windmill
- access to scenic overlook
- alternative route to “a” during heavy snow

Therefore, the protocol fails to address the key issues: whether the route was *open to the public*, and whether the route accessed an *identifiable destination* open to such use. For example, a motorcycle recreational route may be little more than an off-road vehicle playground, as opposed to a highway - a means of travel to an identifiable destination. A route to maintain a barbed wire fence, or to access a water reservoir or windmill for the benefit of a livestock permit-holder (and not the general public) does not meet the definition of a “highway.” Access to a private cabin similarly fails to meet this definition.

Thus, the Moffat County protocol fails to identify or assist in the gathering of key evidence concerning the existence of a highway, another key prerequisite to making any potentially valid R.S. 2477 claim.

### 3. Public Lands Not Reserved for Public Uses

For an R.S. 2477 claim to be valid, the highway must have been constructed prior to 1976 (the date of the statute’s repeal), or prior to the time that the public land was set aside for another use, such as a national wildlife refuge, national park, or national monument. Moffat County’s inventory includes a number of asserted routes that traverse the Dinosaur National Monument (designated Oct. 4, 1915, expanded 1938, boundary modifications in the 1960s). In addition, much of the Browns Park National Wildlife Refuge was purchased from private land-owners. Those land-owners likely acquired those lands under the Homestead Act or similar land settlement statute. Thus, any R.S. 2477 claim on those lands would have to pre-date the lands acquisition by the private owners. Parts of the Refuge were also set aside from public domain lands, apparently in the early 1960s. Any claim related to those lands would have to pre-date the setting aside of those lands for wildlife protection purposes.

Despite the requirements of R.S. 2477, the Moffat County protocols fail to address or recognize these restrictions.

### There Is Another Way

We also urge the County to consider another course of action if there is a need to protect legitimate transportation interests across public lands: using the modern right-of-way issuance procedures set out in the Federal Land Policy and Management Act (FLPMA). Title V of that act provides a way for counties (and others) to obtain rights-of-way for vehicle routes which takes into consideration the values of sensitive lands, potential benefits to the public of issuing a right-of-way, and provides for meaningful public involvement. See 43 U.S.C. §§ 1761-1771; 43 C.F.R. Part 2800. Scores of businesses and local governments have used these procedures to gain access over and through public lands.

### Conclusion

Given the uncertain – and potentially significant – financial costs involved in pursuing these claims, the potentially significant environmental impacts to sensitive public lands (including Dinosaur National Monument), and the protocol’s failure to address at least three

critical components necessary to establish a right-of-way pursuant to R.S. 2477, we strongly urge the Commission to postpone any action on the resolution before it pending further review.

Thank you again for this opportunity to provide comments. We look forward to your timely response and to meeting with you to discuss this matter.

Sincerely,

Pete Kolbensschlag, Western Slope Field Director  
Colorado Environmental Coalition

***Also on behalf of:***

Suzanne Jones, Assistant Regional Director  
The Wilderness Society, Four Corners Regional Office

Vera Smith, Conservation Director  
Colorado Mountain Club

Deb Robison, Associate Regional Representative  
Sierra Club

Matt Sura, Executive Director  
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Cc: Secretary Gale Norton  
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Chas Cartwright, Superintendent  
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